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IN THE

Supreme Court of the United States

OCTOBER TERM—1944

No. 44.

GERHARD WILHELM KUNZE, AUGUST KLAPPROTT, GUSTAV ELMER, HERMANN SCHWINN, HERMAN AGNE, JOSEPH BACHMAIER, JOSEF BELOHLAVEK, CARL FREDERICK BERG, WALTER BORCHERS, OTTO BREGLER, ERNEST MARTIN CHRISTOPH, OTTO FENTZKE, JOHN C. FITTING, BRUNO KNUPFER, WILLIAM C. KUNZ, WILLIAM OTTERSBACH, MAX RAPP, LOUIS SCHATZ, WALTER SCHNELLER, JR., HUGO WEISS, KARL RICHARD WENDLANDT, OTTO WILLUMEIT, FRITZ STREUER,

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF ON BEHALF OF ALL PETITIONERS REPRESENTED BY ASSIGNED COUNSEL

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—against—

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REPLY BRIEF ON BEHALF OF ALL PETITIONERS REPRESENTED BY ASSIGNED COUNSEL.

Pursuant to the permission granted by the Court to the petitioners at the conclusion of the oral argument to file a reply brief not later than Thursday, November 16, 1944, we submit herewith our reply brief. It will be devoted prin-

cipally to the questions raised during the oral argument relative to the Kunze statement* (Exhibit 358)* and the Wendlandt statement (Exhibit 331)**.

POINT I.

The arraignment of Kunze was not in compliance with 5 U. S. C. A. §300a or 18 U. S. C. A. §595.

In response to the inquiries by Mr. Justice Roberts and other members of the Court in respect to the date of Kunze's arraignment, we should like first to clarify the Record on this point.

The Record certified to this Court by the Circuit Court of Appeals for the Second Circuit, pursuant to Rule 38, subdivision 1, of the Rules of this Court, shows no arraignment of Kunze earlier than July 7, the day following the day upon which his statement was signed (R. 795).

The recital by the Circuit Court of Appeals below in its opinion (R. 1080, 1083) that Kunze was arraigned on July 6 finds no support whatever in the record which was before the Circuit Court of Appeals; it is based solely upon a foot-note on page 58 of the Government's Brief in the Circuit Court of Appeals which referred to "the Selective Service complaint under which the appellant Kunze was arraigned on July 6, 1942, a document which constitutes part of the records of the office of the United States Commissioner for the Southern District of New York". No such document is

* The Kunze statement is handed up to the Court herewith and incorporated by reference herein as Appendix A. The first sentence of the last paragraph commencing on page 4 was deleted by the District Court (R. 788-789).

** The Wendlandt statement is handed up to the Court herewith and incorporated by reference herein as Appendix B. The next to the last paragraph commencing on page 5 was deleted by the District Court (R. 692).

on file, nor has one ever been on file, in the office of the United States Commissioner for the Southern District of New York. This the Government now concedes.

In a Memorandum filed by the Government in May, 1944 in opposition to the petitions for certiorari in this case, the Government *for the first time* referred to seven documents which it claimed had some bearing upon the arraignments of Kunze and Wendlandt but which had been before neither the District Court nor the Circuit Court of Appeals (See footnotes 27, 28, 29, 30 of Government's Memorandum In Opposition to Certiorari). Photostats of these documents presumably were attached to the copies of the Government's Memorandum filed with this Court but copies of the photostats were not supplied to assigned counsel for the petitioners until after the writs of certiorari were granted by this Court on May 15, 1944 and until assigned counsel specifically requested the Government to supply them with copies. The seven documents referred to in the Government's Memorandum, photostatic copies of which were supplied to assigned counsel by the Government on May 25, 1944, are as follows:

1. Complaint filed in the District Court for the Southern District of New York on July 7, 1944 charging Kunze with having failed to keep his Local Selective Service Board advised at all times of the address where mail would reach him. [These facts, the Government speculates (Government's Memorandum, footnote 27), "would seem to indicate that Kunze was brought before the United States District Judge on the same day (July 6) on which the complaint was issued; and this was the same day on which he had made the statement admitted in evidence."]

2. Criminal Docket pages showing Kunze's pleas of not guilty on July 7, 1942 to "both charges" [Government's Memorandum, footnote 28].

3. Transcript of proceedings in respect to Wendlandt before the United States Commissioner for the Western District of New York on July 8, 1942 [Government's Memorandum, footnote 29].

4. Commissioner's order committing Wendlandt to the Erie County jail [Government's Memorandum, footnote 30].

5. Notice of application by the United States Attorney for the Western District of New York and Wendlandt's consent for a warrant to remove him to the Southern District of New York [Government's Memorandum, footnote 30].

6. Warrant by the United States Commissioner for the Western District of New York, based on the affidavit of F.B.I. agent Young, for the apprehension of Wendlandt [Government's Memorandum, footnote 30].

7. Bench warrant issued by the District Court for the Southern District of New York for the arrest of Wendlandt [Government's Memorandum, footnote 30].

It will be noted that there is not included among the documents above listed, photostatic copies of which were attached to the Government's Memorandum In Opposition To Certiorari and supplied to assigned counsel on May 25, 1944, after writs of certiorari had been granted by this Court, any transcript of docket entries showing an arraignment of Kunze on July 6, 1942.

Not until after assigned counsel on the oral argument in this Court had challenged counsel for the Government to show to the Court anything inside or outside of the Record in this case to establish that Kunze was arraigned on July

, 1942, did counsel for the Government, after conclusion of he argument in this Court, *for the first time*, disclose to ssigned counsel a photostatic copy of an extract from ages 48 and 53 of the July 6, 1942 minutes of the Clerk f the District Court for the Southern District of New York, hich contained the following entry:

> "Comm. H5-14 Gerhardt Wilhelm Kunze. Arraigned on Complaint. Bail $50,000.00. Remanded. Hearing 7/13/42."

The photostatic copy of this extract was certified by the lerk of the District Court for the Southern District of New York on August 16, 1944 and presumably was filed with the Clerk of this Court some time thereafter. A copy of this extract at no time was served upon or supplied to ssigned counsel for the petitioners. We have related the bove facts in detail with no intention of criticizing counsel for the Government, but simply to clarify the position taken by assigned counsel on the argument in respect to the Government's assertion that Kunze was arraigned on July 6 and further to apprise the Court of the basis for this claim.

It should be noted that the entry quoted above from the July 6 minutes of the Clerk does not indicate upon what charge Kunze was arraigned. Certain it is that he was not arraigned on that day upon the charge of conspiracy on which he later was tried, for no complaint ever was filed charging conspiracy. We fail to find any support in this entry for the following statement at page 59 of the Government's Brief:

> "On Monday, July 6, the same day that this statement was made, Kunze was arraigned upon a complaint filed in the District Court of the United States for the Southern District of New York, charging him with the offense of wilful failure to keep his draft board advised of the

address at which mail could reach him, in violation of Section 11 of the Selective Training and Service Act."

Moreover, in our view of the *McNabb* doctrine, particularly as amplified in the *Mitchell* case, it makes no difference whether Kunze was arraigned on July 6 or July 7 or thereafter. It is undisputed that he was arraigned *subsequent to* the procurement of his statement. If this Court finds, as we believe the facts fully warrant, that Kunze's statement was obtained while he was under illegal detention and particularly in view of the aggravating circumstances with which the illegal detention was coupled, then it is immaterial whether Kunze was arraigned six hours or thirty hours after the statement was signed. The statement was inadmissible in either event.

In our opinion it is not without significance that the Government has gone to extreme lengths in this case to obtain the sanction by this Court of an arraignment, on a charge other than the one upon which Kunze was tried, as constituting compliance with the prompt production statutes. We are confident that this Court will recognize such an arraignment as a plain subterfuge for the prompt arraignment commanded by the statutes. Even if the arraignment of Kunze on the charge of failing to keep his draft board informed of his changes of address had occurred prior to the procurement of his statement, we submit that the statement would be inadmissible against him at a trial for conspiracy. The most important function of the arraignment provided for by Congress is to apprise an arrested man of the charge against him. To inform an accused person that a certain charge is pending against him, then to proceed to take a statement from him and to offer it in evidence against him on a different charge, would be more harmful to the accused than if he had not been arraigned at all. With no arraignment, at least the arrested person would not be lulled

into a sense of false security. Furthermore, the Government knew when it ordered Kunze's arrest in Mexico that the charge for which he was wanted was one of conspiracy, because the organization of which he was the national leader had been under investigation by the Government since the summer of 1938 (R. 345).

POINT II.

Kunze was inexcusably detained for the purpose of extracting admissions from him.

In response to the inquiry by Mr. Justice Frankfurter as to whether there are any facts in the Record in this case, similar to those which the Government asserts at page 65 of its Brief were present in the *McNabb* and *Anderson* cases, which establish that Kunze was inexcusably detained for the purpose of extracting admissions from him, it is our position that the entire course of conduct by the Federal Bureau of Investigation from the time Kunze was arrested in Mexico until he was arraigned in New York City impels the conclusion that the paramount purpose of the F.B.I. during the week or more of Kunze's illegal detention was the extraction of the incriminating statement admitted in evidence as Exhibit 358. The following is a summary of the facts which we believe impel this conclusion:

1. Kunze was arrested on or about July 1 (R. 795) in Mexico by Mexican authorities pursuant to a working arrangement with the F.B.I. similar to the working arrangement between the federal authorities and local authorities in the *Anderson* case (p. 353) and the *Runnels* case (p. 347). Kunze was delivered to the F.B.I. in Texas (R. 796) presumably at the telegraphic request of the F.B.I., requiring no extradition formalities, since Kunze was delivered to the F.B.I. within a few days after his arrest in Mexico. Under such

a close working arrangement with the Mexican authorities, an arraignment of Kunze promptly after his arrest could have been arranged, had the F.B.I. not been determined to procure a statement from him before arraigning him.*

2. Kunze was taken by the F.B.I. before the United States immigration authorities in Brownsville, Texas, for questioning on the morning of July 4 (R. 796) but was not taken before either a United States Commissioner or a local Texas magistrate for arraignment on that day.

3. Kunze was flown by plane from Texas to New York, leaving Texas on July 4 and arriving at LaGuardia Field at 8:15 A.M. on July 5, having had only occasional sleep during the plane trip (R. 794-796). Upon arrival in New York, he was not taken before either the United States Commissioner or the City Magistrate sitting in Weekend Court for arraignment, although the F.B.I. agents who had Kunze in custody necessarily passed the doors of both the Weekend Court and the United States Commissioner's office in order to get Kunze to the F.B.I. offices in the United States Courthouse.

4. Kunze was fingerprinted, photographed, booked and placed in a cell sometime between 8:15 A.M. and 11:00

* This Court should be entitled to draw reasonable inferences from the record facts (R. 795) of Kunze's arrest in Mexico by Mexican authorities "a few days" previous to July 4, all to the knowledge of one of the F.B.I. agents who questioned him from 11 A.M. on July 5 to 5 A.M. on July 6. Note that the Government has not undertaken to enlarge the Record to show the facts in regard to Kunze's arrest and detention in Mexico (Government's Brief, p. 58, footnote 39), although it urges this Court to enlarge the Record in respect to the arraignments of Kunze and Wendlandt (Government's Brief, pp. 51, 52, 60, footnotes, 33, 34, 35, 36, 37, 40, 41).

A.M. upon his arrival at the F.B.I. offices in the United States Courthouse in New York on July 5 (R. 794).

5. Kunze was kept in this cell incommunicado during the entire eighteen hour period of his questioning by three F.B.I. agents (R. 796), without the aid of friends, relatives or counsel.

6. Kunze "was informed that he did not have to make any statement unless he so desired, and that further, if he made such statement it may be produced in court against him, and he was also advised that no promises, immunity or remuneration would be made to him" (R. 788), but he was not advised that F.B.I. agents were undertaking to suspend his right to a writ of habeas corpus, his right to bail, his right to advice of counsel and his right to have a judicial determination of the sufficiency of the justification for his detention.*

7. Kunze was questioned from 11 A.M. on July 5 to 5 A.M. on July 6, at which time he signed the statement (Exhibit 358) which had been dictated by F.B.I. agent O'Neill with the "assistance" of Kunze whom O'Neill knew had slept only occasionally since the early morning of July 4 (R. 787, 794-796). While Kunze was not questioned continuously during this period (R. 795), there is no showing that he was given any time for sleep or relaxation or food. From

* In response to the inquiry by Mr. Justice Rutledge as to whether Kunze was denied any constitutional right which he requested, we replied in the negative on the oral argument. We should add that in our view it should not be incumbent upon an arrested person to notify an arresting officer as to which of his constitutional rights are being suspended; it is the duty of the arresting officer to see to it that the arrested person is advised *by a judicial officer* of his constitutional rights.

the fact that three statements aggregating approximately twenty single-spaced typewritten pages were taken from him during this period (R. 787-790) and the fact that he was questioned from behind iron bars "all the time" (R. 796), it may reasonably be inferred that the questioning occupied a substantial portion of this eighteen hour period.

8. Kunze was not arraigned on July 6, the first business day after he arrived in New York on the charge upon which he later was tried, in support of which his statement was introduced; on this charge he was not arraigned until at least thirty hours after his statement was signed or some fifty hours after he arrived in New York (R. 795, 1062).

We respectfully submit that the detention of Kunze for a week before he was arraigned was inexcusable principally because such detention was in violation of the command of immediate arraignment of an arrested person which Congress has imposed upon agents of the Federal Bureau of Investigation by the terms of 5 U. S. C. A. §300a. That Congress included this immediate arraignment provision in the statute advisedly is clearly demonstrated by the history of the statute. The bill originally proposed by the Attorney General did not contain the immediate arraignment provision. Before reporting the bill favorably, the Judiciary Committee of the House of Representatives included the immediate arraignment provision in the bill and in this form the bill was enacted and has continued as the law of the land to this day. Since we believe it to be the function of this Court in interpreting an act of Congress to give effect to the clear intention of Congress, we do not believe that this Court would be warranted in deviating far from the literal meaning of immediate arraignment as contained in the statute.

Certainly this Court should be slow to sanction the various subterfuges proposed by the Government to circumvent the statutory command of immediate arraignment. For example, the Government urges (Government Brief, p. 65) that the delay in arraigning Kunze was attributable to the intervention of a holiday; this delay the Circuit Court of Appeals below sanctioned (R. 1083-1084). We do not believe that the delay of approximately one week in arraigning Kunze can be excused by the intervention of a holiday weekend, for the reasons that (1) United States commissioners and local magistrates* were available, or could have been made available by very little effort on the part of the F.B.I., in both Texas and New York, had a prompt arraignment of Kunze been desired (we fully agree with Mr. Justice Murphy that it is immaterial whether it is easy or difficult for the F.B.I. to arraign an arrested person promptly, since the F.B.I. is

* The following testimony by Attorney General Biddle at the Hearings Before Subcommittee No. 2 Of The Committee On The Judiciary, House Of Representatives, 78th Congress, First Session, on H. R. 3690 (The Hobbs Bill), at p. 34, is of interest:

"Mr. Cravens: In some of the cases you mentioned a United States commissioner was not immediately available so that the defendants could be arraigned, as I understand.

Attorney General Biddle: That is true.

Mr. Cravens: Is a Federal officer limited to taking an accused or suspect before a United States commissioner?

Attorney General Biddle: I suppose he could arraign the accused before a district judge or a local magistrate. I would say that the regular practice is to take an accused before a commissioner.

In this later case there was only a matter of a few hours involved.

Mr. Towe: A Federal arresting officer could arraign a prisoner before a State magistrate, could he not?

Attorney General Biddle: Yes. The purpose is only to show reasonable cause for detention.

Mr. Towe: Could a State official set bail in such a case?

Attorney General Biddle: Yes.

Mr. Springer: Arraignment could be had before a justice of the peace, could it not?

Attorney General Biddle: Yes."

commanded by the statute to arraign an arrested person immediately); (2) Kunze was not arraigned even on the first business day after his arrival in New York upon the principal charge for which he was sought and upon which he later was tried; and (3) the intervention of the holiday weekend was utilized by the F.B.I., in our opinion, solely as a subterfuge to circumvent the prompt production statutes. It has now become the standard practice in the Southern District of New York, under the sanction of the opinion by the Circuit Court of Appeals below on this point, to arrest men immediately before a holiday weekend so that they may be questioned with impunity during the weekend before the necessity of arraignment.

In response to the inquiry by Mr. Justice Jackson as to what in our opinion would constitute a desirable time limit within which arresting officers should be required to present an arrested person for arraignment in order to comply with the prompt production statutes, we respectfully commend the proposals contained at pages 28-41 of the *Memorandum on the Detention of Arrested Persons and Their Production Before a Committing Magistrate* (1944), prepared by some members of the Bill of Rights Committee of the American Bar Association and submitted to the House Committee on the Judiciary in opposition to the Hobbs Bill. We especially commend to the Court the proposition that the standard of what constitutes a reasonable period of time between arrest and arraignment should "depend on the time required to carry the suspect to the Commissioner and not on the time desired to keep him away from the Commissioner" (*id.* at 30).

POINT III.

The contents of the Kunze and Wendlandt statements, while not relevant to the crime charged, were highly incriminating, inflammatory and prejudicial.

In response to the inquiry by Mr. Justice Douglas and other members of the Court in regard to the contents of the Kunze and Wendlandt statements, we should like briefly to summarize the assertions in each statement which were more than "background evidence", which were not "merely cumulative", and which indeed cannot be lightly disposed of on the ground that they "added nothing of substance to the Government's case" (Government's Brief, pp. 57-58, 60).

As Mr. Justice Frankfurter pointed out at the time of the oral argument, the Wendlandt statement concludes with the assertion that it "is made only for the added information herein". We believe that the following damaging admissions found in Wendlandt's statement constitute "added information" which is not found in any other statement given by Wendlandt or at any other point in this Record:

1. That he used the alias name "Karl Wendel" (Wendlandt Statement, page 1).

2. That he never entered into any subversive activities against the United States and never at any time entered into espionage or sabotage of any kind (Wendlandt Statement, page 1).

3. That as local unit leader, he was never approached by Kunze or any other national leader to do any sabotage or espionage work for the Bund (Wendlandt Statement, page 1).

4. That he was never approached to give any material or information concerning the national defense industries in Buffalo, in Western New York, or in the United States, and that he never was given and never himself gave any information about national defense industries (Wendlandt Statement, pages 1-2).

The assertions above set forth found in the Wendlandt statement, while couched in the negative, of course were intensely prejudicial and highly inflammatory, as well as incriminating, against Wendlandt and every defendant on trial with him.

The Kunze statement contained the following assertions which we find in no other statement given by Kunze nor in any other portion of the Record:

1. That, despite his registration under the Selective Training and Service Act, he made numerous trips throughout the United States without notifying his local draft board, and he did not procure from his local draft board permission to travel (Kunze Statement, page 1).

2. That he intentionally neglected to obtain from his local draft board the necessary permission to leave the United States before entering Mexico (Kunze Statement, page 1).

3. That he left the United States for Mexico on November 8, 1941 for the twofold purpose of renouncing his American citizenship so that he might acquire German citizenship and of making his way to Germany for the purpose of enlisting in the German Army and fighting against Communism (Kunze Statement, page 1).

4. That in pursuance of his intention to renounce his American citizenship, he wrote a letter from Mexico to the United States Department of Labor requesting that his American citizenship be revoked (Kunze Statement, page 2).

5. That if the war were confined to hostilities between Germany and Russia and between Germany and England, his sympathies would be exclusively with Germany (Kunze Statement, page 3).

6. That if the war were confined to American-Japanese hostilities, his sympathies would be favorable to Japan to the extent that a nation of one hundred million people needs a certain amount of room in which to live, unless it is to be condemned to a voluntary suicide (Kunze Statement, page 3).

7. That if the war were confined to hostilities between Germany and the United States, he would favor a negotiated peace with Germany dominant in Europe and the United States dominant in the Western Hemisphere (Kunze Statement, page 3).

8. That in his honest opinion, Mr. Roosevelt, through his international policy, provoked war with Japan and with the European powers presently aligned against the United States (Kunze Statement, page 3).

The foregoing assertions set forth in the Kunze statement, as well as numerous others found in the same statement, in their bold declaration of disloyalty to the United States, were about as akin to dynamite to the jury which was trying Kunze and his co-defendants in time of war as any admissions conceivably could be. The Government's position

that these statements were merely cumulative background evidence, adding nothing of substance to the Government's case, is indeed an unrealistic position.

In response to the inquiry by the Chief Justice and by Mr. Justice Black as to how the petitioners are able to reconcile the position taken by them at the trial that the Kunze and Wendlandt statements were irrelevant and immaterial with the position taken by the petitioners in this Court that the Kunze and Wendlandt statements were the most effectual weapons utilized by the Government to obtain the convictions not only of Kunze but of all the defendants on trial, we should like briefly to clarify our position in this respect. We objected to the admission of the statements in question at the trial on the ground that they were irrelevant and were prejudicial to all defendants on trial, including Kunze and Wendlandt (R. 788, 692). We still believe that the position which we took in the trial court was correct, viz. that whereas the Kunze and Wendlandt statements might be material on the issue of the declarants' state of mind if they were being tried for treason or adherence to the enemy or for revocation of their citizenship, these statements were not material even on the question of the defendants' intent on a charge of conspiracy to counsel evasion, resistance or refusal of service in the land and naval forces of the United States. The position which we took in objecting to the Kunze and Wendlandt statements in the trial court, however, was overruled and the determination by the trial court that the statements were material and relevant became the law of the case. The jury in its deliberations necessarily was bound by the instructions given by the trial court that the Kunze and Wendlandt statements were material and relevant to the crime for which the defendants were on trial. The Circuit Court of Appeals below affirmed this as the law of the case. Accordingly, it is our position in this Court that the Kunze and Wendlandt statements, however,

irrelevant and immaterial we deemed them to be to the issues on trial in the District Court, were directly and in large measure responsible for the verdict of guilty rendered by the jury against all the petitioners. As the crux of the Government's case, the Kunze and Wendlandt statements, more than any other evidence introduced by the Government, insured the conviction not only of Kunze and Wendlandt, but of all the petitioners. The Government conceded on the oral argument in this Court that the Kunze and Wendlandt statements indubitably injured the respective declarants before the jury. In the light of this concession we are not much impressed by the Government's contention that the statements in question are merely background cumulative evidence, adding nothing of substance to the Government's case. Nor are we persuaded by the Government's contention that it offered the Kunze and Wendlandt statements in evidence, knowing that they were irrelevant, for the reason that it was not anticipated that the respective declarants would not take the witness stand in their own defense.

POINT IV.

The Kunze and Wendlandt statements prejudiced all the defendants on trial.

In view of the Government's concession on the oral argument in this Court that the Kunze and Wendlandt statements in fact did injure and therefore incriminated the respective declarants before the jury, we are confident that this Court will have no difficulty in recognizing the incriminating effect of these statements upon the other defendants on trial with Kunze and Wendlandt.

In the first place, the trial court in receiving the Kunze statement in evidence stated, upon its own initiative and without any request from counsel, that the objection to

the statement made by Kunze's counsel "will be taken as extending to all defendants" (R. 788). This gesture on the part of the trial court indicates that the effect of the statement upon the defendants other than the declarants was fully appreciated.

Secondly, by the very design of the Government's case Kunze was the central figure of the conspiracy with whom the Government claimed all the other defendants conspired and with whom the Government sought to show all the other defendants were in close association. Indeed, as we pointed out in response to the inquiry by Mr. Justice Reed on the oral argument in this Court, the prosecutor who tried the case for the Government in the District Court in his summation to the jury specifically referred to the Kunze statement (R. 983-984) and applied the Kunze statement to the other defendants on trial (R. 998-99):

> "I believe that somewhere in the course of this trial somebody took occasion to remark that men are judged by the company they keep. It is a very old saying, but it is one that this jury might well keep in mind before passing upon the issues in this case and in considering the evidence which has been introduced. They might well remember, for example, what kind of company these defendants were keeping when they pledged their fealty and their allegiance to such a man as Kunze, the man who fled the country in 1941 when the war imminent with Germany, fled so that he might return to Germany to take up arms for Adolf Hitler."

It will be noted that the trial court in its charge to the jury did not even attempt to distinguish between the effect of the Kunze and the Wendlandt statements upon the declarants on the one hand and the other defendants on the other hand. This is conceded by the Government at page 67 of its brief.

And finally we believe that the *Anderson* case (pp. 356-357) and the *Haupt* case (p. 666) squarely support our contention that the incriminating statements of Kunze and Wendlandt implicated all the petitioners since here, as in the *Anderson* case (p. 357), "There is no reason to believe, therefore, that confessions which came before the jury as an organic tissue of proof can be severed and given distributive significance by holding that they had a major share in the conviction of some of the petitioners and none at all as to the others."

POINT V.

The subsequent admission of a second Kunze statement (Exhibit G), having been offered by Kunze's counsel, did not cure or waive the error in the admission of the first Kunze statement (Exhibit 358).

We cannot believe that the Government is serious in urging (Government's Brief, pp. 61-65) that the error committed by the District Court in admitting Exhibit 358 was cured or waived by the subsequent admission of Exhibit G upon the offer of counsel for Kunze. The latter exhibit was offered by defense counsel in explanation of, and in an attempt to mitigate the damaging effect of, Exhibit 358. We submit that the offer by defendants of Exhibit G and the receipt thereof in evidence did not cure or waive in the slightest the error committed by the District Court in the admission of Exhibit 358. If the Government's contention in this respect were to be accepted, no trial counsel could cross-examine a witness on a line of testimony to which he had objected on the direct examination of the witness without running the risk of waiving his objection made on the direct examination of the witness. The same restraint would be present in the case of redirect examination and in the

presentation of a rebuttal case. We know of no court which has so circumscribed the areas of cross examination, redirect examination and the presentation of a rebuttal case. We respectfully submit that the Government's argument that the petitioners are estopped from asserting the error in the admission of Exhibit 358 is wholly without foundation.

POINT VI.

The evidence was not sufficient to sustain the indictment or the verdict of the jury as against the petitioners.

Upon the oral argument in this Court the Government conceded that the evidence against the petitioner Schneller was not sufficient to sustain the indictment or the verdict of the jury against him. Parenthetically, we believe it to be an unfortunate commentary upon the administration of Federal criminal justice, over which this Court exercises a power of supervision, that the Department of Justice has chosen to wait until Schneller has remained in prison for more than two years before it concedes the insufficiency of the Government's case against him. Why could not the Government have frankly conceded its lack of evidence against Schneller before the indictment was returned, or before Schneller was placed on trial under the indictment, or before the case was allowed to go to the jury as to Schneller, or before Schneller's appeal to the Circuit Court of Appeals below was taken, or before Schneller's petition for certiorari was resisted by the Government in this Court? The course of conduct resorted to by the Department of Justice in failing to acknowledge the insufficiency of its case against Schneller until the oral argument in this Court surely tends to undermine the confidence of the public and of the Bar in the seriousness with which the Department of Justice undertakes to protect the innocent from unwarranted prosecution.

In view of the Government's concession as to the weakness of its case against the petitioner Schneller, we respectfully request this Court to examine with care the tenuousness of the evidence against several of the other petitioners, particularly Agne, Bachmaier, Borchers and Fentzke. We have summarized the evidence against these petitioners, as well as the evidence against the other petitioners represented by assigned counsel, at pages 80-97 of our main brief and we do not find that the summary of the evidence against these petitioners set forth at pages 95-143 of the Government's Brief is substantially different from our summary.

We should like also particularly to call the attention of the Court to certain of the evidence introduced against the petitioners Belohlavek, Bochers, Bregler and Weiss, which evidence had been obtained by an illegal use of subpoenae duces tecum. In each case the evidence, consisting of physical exhibits, was admitted in evidence, brandished before the jury and later excluded from the Record upon instructions by the District Court which failed adequately to identify the excluded material. The Government has failed in its brief, as well as on its oral argument in this Court, to deny this error. Accordingly, we assume that the Government confesses this error.

We are confident that this Court, upon an examination of the tenuousness of the evidence against many if not all of the petitioners, will find that the numerous errors committed by the District Court in the admission of evidence, particularly the Kunze and Wendlandt statements, as well as the other errors specified in our main brief, warrant a reversal of the convictions of all the petitioners. The doctrine of non-prejudicial error invoked by the Circuit Court of Appeals below in this case (R. 1079-1085) has worked a miscarriage of justice as to the petitioners herein, as now acknowledged by the Government in conceding that the evidence against Schneller was not sufficient.

CONCLUSION.

The judgments of conviction of all petitioners should be reversed.

Dated: New York City, November 15, 1944.

Respectfully submitted,

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